Office-Supreme Court, U.S.
FILED
OCT 20 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1772

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES,
Petitioner,

v.

FREEMAN H. RINGER, *et al.*,
Respondents.

BRIEF FOR THE RESPONDENTS

Malcolm J. Harkins, III
CASSON, CALLIGARO & MUTRYN
9808 Wilshire Boulevard
Suite 304
Beverly Hills, California 90212
(213) 858-5981

Joseph E. Casson
Robert Fabrikant
Joseph L. Bianculli
CASSON, CALLIGARO & MUTRYN
900 Watergate Office Building
2600 Virginia Avenue, N.W.
Washington, D.C. 20037
(202) 462-3200

Attorneys for Respondents

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
I. Introduction	1
II. Factual Background	2
SUMMARY OF ARGUMENT	10
ARGUMENT	12
I. The Decision Of The Court Of Appeals Finding Jurisdiction Under 42 U.S.C. § 405(g) Is Dictated By *Weinberger v. Salfi* and Its Progeny	12
II. The Court Of Appeals Properly Held That Plaintiffs' Claims Fall Within The District Court's Mandamus Jurisdiction	19
A. Mandamus Jurisdiction Under 28 U.S.C. § 1361 Is Not Precluded By 42 U.S.C. § 405(h)	19
B. Plaintiffs Have Alleged A Non—Discretionary Duty Sufficient To State A Cause Of Action Within The District Court's Mandamus Jurisdiction	23
III. The Court Of Appeals Ruling That Plaintiffs' Claims May Be Heard Under 28 U.S.C. § 1331 Is Consistent With Prior Decisions Of This Court	26
IV. The Secretary's Claim That The Court Of Appeals Decision Will Disrupt The Administration Of The Medicare Program Is Erroneous	29
CONCLUSION	32

TABLE OF AUTHORITIES

CASES:	Page
Aldrich v. Schweiker, 555 F. Supp. 1080 (D. Vt. 1982)	20,22,30
Americana Healthcare Corp. v. Schweiker, 688 F.2d 1072(7th Cir. 1982)	20
American Association of Councils of Medical Staffs v. Califano, 575 F.2d 1367 (5th Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979)	20
Association of Am. Medical Colleges v. Califano, 569 F.2d 101 (D.C. Cir. 1977)	20
Attorney Registration and Disciplinary Comm'n v. Schweiker, No. 83-1132 (7th Cir. Slip Op. filed Aug. 11, 1983)	26
Barnett v. Califano, 580 F. 2d 28 (2nd Cir. 1978)	20
Barry v. Barchi, 443 U.S. 55 (1979)	17
Blankenship v. Secretary of H.E.W., 587 F.2d 329 (6th Cir. 1978)	17
Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, Inc., 402 U.S. 313 (1971)	24
Califano v. Yamsaki, 442 U.S. 682 (1978)	11,19,26
Caswell v. Califano, 583 F.2d 9 (1st Cir. 1978)	17
Cervoni v. Secretary of Health, Education & Welfare, 581 F.2d 1010 (1st Cir. 1978)	20
Continental Can Co. v. Marshall, 603 F.2d 590 (7th Cir. 1979)	17,25,28
Daniel Freeman Memorial Hospital v. Schweiker, 656 F.2d 473 (9th Cir. 1981)	28
De Lao v. Califano, 560 F.2d 1384 (9th Cir. 1977)	16
Elliott v. Weinberger, 564 F. 2d 1219 (9th Cir. 1977), *aff'd in part and rev'd in part, sub nom Califano v. Yamasaki*, 442 U.S. 682 (1978)	20,21,22, 26
Ellis v. Blum, 643 F.2d 68 (2nd Cir. 1981)	20,21,22, 24,25,28
Florida v. Weinberger, 401 F.Supp. 760 (D.D.C. 1975)	29
Frost v. Weinberger, 515 F.2d 57 (2nd Cir. 1975), *cert. denied*, 424 U.S. 958 (1976)	20

	Page
Gibson v. Berryhill, 411 U.S. 564 (1973)	17
Griffin v. Richardson, 346 F. Supp. 1226 (D. Md.), aff'd, 409 U.S. 1069 (1972)	26
Hadley Memorial Hospital, Inc. v. Schweiker, 689 F.2d 905 (10th Cir. 1982)	20
Humana of South Carolina, Inc. v. Califano, 590 F.2d 1070 (D.C. Cir. 1978)	26,28
Jones v. Califano, 576 F.2d 12 (2nd Cir. 1978)	16,24,28, 30
Kuehner v. Schweiker, No. 82-1514 (3rd Cir. Slip Op. filed Sept. 19, 1983)	16,20,21, 27,28,30
Leschniok v. Heckler, 713 F.2d 520 (9th Cir. 1983)	20,26,30, 31
Lewis v. Weinberger, 415 F.Supp. 652 (D.N.M. 1976)	29
Liberty Alliance of the Blind v. Califano, 568 F.2d 333 (3rd Cir. 1977)	16,28
Lopez v. Heckler, No. 83-0697-WPG (C.D. Cal. Slip Op. filed June 18, 1983), *stay granted, Heckler v. Lopez*, 52 U.S.L.W. 3187 (Sept. 20, 1983) (Rehnquist, Circuit Justice), *refusing to vacate stay*, No. A-145 (Order entered Oct. 11, 1983)	12,27,30, 31
Martinez v. Richardson, 472 F.2d 1121 (10th Cir. 1973)	20
Mathews v. Diaz, 426 U.S. 67 (1976)	*passim*
Mathews v. Eldridge, 424 U.S. 319 (1976)	*passim*
Matos v. Secretary of HEW, 581 F.2d 282 (1st Cir. 1978)	20
Mattern v. Weinberger, 519 F.2d 150 (3rd Cir. 1975), *vacated on other grounds*, 425 U.S. 987 (1976)	20
Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974)	18
Montana v. United States, 440 U.S. 147 (1979)	25
Morton v. Ruiz, 415 U.S. 199 (1974)	29

	Page
National Assoc. of Home Health Agencies v. Schweiker, 690 F.2d 932 (D.C. Cir. 1982), *cert. denied*, ____ U.S. ____, 103 S. Ct. 1193 (1983)	28
Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979)	25
Patsy v. Florida International University, 634 F.2d 900 (5th Cir. 1981), *reversed on other grounds*, ____ U.S. ____, 102 S.Ct. 2557 (1982)	17
Peoples v. Dept. of Agriculture, 427 F.2d 561 (D.C. Cir. 1970)	21
Powderly v. Schweiker, 704 F.2d 1092 (9th Cir. 1983)	20
Ringer v. Schweiker, 697 F.2d 1291 (9th Cir. 1982)	*passim*
Roberts v. United States ex rel. Valentine, 176 U.S. 221 (1900)	20,21
Rodway v. Department of Agriculture, 514 F.2d 809 (D.C. Cir. 1975)	29
Ryan v. Shea, 525 F.2d 268 (10th Cir. 1975)	20
Schweiker v. McClure, 456 U.S. 188 (1982)	1,28
Service v. Dulles, 354 U.S. 363 (1957)	29
Spear v. Harris, No. 80143 (D. Vt. Slip Op. filed July 31, 1980)	30
St. Louis University v. Blue Cross Hospital Service, 537 F.2d 283 (8th Cir.), *cert. denied*, 429 U.S. 977 (1976)	26,28
Stark v. Wickard, 321 U.S. 288 (1944)	21
Starker v. United States, 602 F.2d 1341 (9th Cir. 1979)	25
Starnes v. Schweiker, No. 82-1543 (4th Cir. Slip Op. filed Aug. 16, 1983)	21
Stuckey v. Weinberger, 488 F.2d 904 (9th Cir. 1973)	24
United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954)	29
United States ex. rel. U.S. Borax Co. v. Ickes, 98 F.2d 271 (D.C. Cir. 1938)	21
Weinberger v. Salfi, 422 U.S. 749 (1975)	*passim*
West Coast Exploration Co. v. McKay, 213 F.2d 582 (D.C. Cir.) *(en banc)*, *cert. denied*, 347 U.S. 989 (1954)	21
White v. Mathews, 559 F.2d 852 (2nd Cir. 1977), *cert. denied*, 435 U.S. 908 (1978)	27
Wright v. Califano, 587 F.2d 345 (7th Cir. 1978)	27

	Page
STATUTES:	
5 U.S.C. § 704	15
28 U.S.C. § 1331	11,22
28 U.S.C. § 1361	11,19,20, 22
42 U.S.C. § 405	*passim*
42 U.S.C. § 405(g)	11,12,19, 25
42 U.S.C. § 405(h)	*passim*
REGULATIONS:	
20 C.F.R. § 422.408	8
20 C.F.R. § 404.1700 *et seq.*	6
42 C.F.R. § 405.720	8
MISCELLANEOUS:	
36 *Fed. Reg.* 2532 (1971)	29
37 *Fed. Reg.* 5814 (Mar. 22, 1972)	14
40 *Fed. Reg.* 53385 (Nov. 18, 1975)	14
45 *Fed. Reg.* 71426 (October 28, 1980)	6,7,8, 13
In Re Ferguson, No. 126-12-3830 (HHS Appeals Council, October 18, 1979)	3,4,9 19
In re Kohnen, No. 335-07-2535 (HHS Appeals Council, Dec. 4, 1979)	5
S. Rep. No. 752, 79th Cong. 1st Sess. (1945), *reprinted in*, Senate Committee on the Judiciary, Administrative Procedure Act: Legislative History 79th Cong. 1944-46 (1946)	15,22

STATEMENT OF THE CASE.

I. Introduction.

This case raises jurisdictional issues settled by this Court's decision in *Mathews v. Diaz*, 426 U.S. 67 (1976). Characterization of the issues here as jurisdictional, however, masks the true nature of this case behind overly technical legal constructs. In fact, this case squarely raises the question of abuse of rights which arises whenever an administrative agency assumes it can act without accountability or judicial restraint. This is a case of an administrative agency at war with itself—an agency which simultaneously mandates exhaustion of administrative procedures while prohibiting their effective application, an agency which demands that administrative relief be sought while declaring such relief to be unavailable.[1]

Plaintiffs' principal complaint is that the Secretary of Health and Human Services, the petitioner, requires every person seeking medicare reimbursement for a surgical procedure known as bilateral carotid body resection ("BCBR") to litigate administratively the safety and efficacy of the procedure as a prerequisite to eligibility for such reimbursement. The Secretary insists on relitigating the same issues in every case even though 170 claimants have exhausted fully the administrative process, in some twenty-five consolidated cases. Further, prior to the filing of this action, in *every* case the Secretary's administrative law judges ("ALJs") and the Appeals Council, the highest quasi-adjudicative body within the Department of Health and Human Services, had held that BCBR was safe and effective and ruled that the medicare program must pay the costs of the surgery. The Secretary

[1] The Secretary's description of the medicare program is adequate and will not be repeated. Plaintiffs do not, however, agree with the Secretary's argumentative characterization of some of the pertinent statutes and regulations. Similarly, plaintiffs do not accept the Secretary's conclusion with respect to the continuing validity of their Part B constitutional claims. *See Schweiker v. McClure*, 456 U.S. 188 (1982).

continues to demand more administrative litigation on these same issues despite her admission that "on October 28, 1980, HCFA [the Health Care Financing Administration] issued a formal administrative ruling—binding upon ALJs and the Appeals Council—that prohibited payments under Medicare for BCBR performed after that date." Brief for the Petitioner at 9.

In the District Court plaintiffs sought both a declaration that the Secretary's "relitigation" policy was illegal and an injunction precluding further application of the policy. Plaintiffs did *not* seek a determination of eligibility for benefits, or an order requiring the payment of benefits. Nevertheless, the Secretary urged the District Court to dismiss plaintiffs' challenge to her procedures on the ground that the Social Security Act, 42 U.S.C. § 405(h), requires plaintiffs, as a jurisdictional prerequisite, to exhaust the very administrative procedures they are challenging. The District Court granted the Secretary's motion and dismissed the case, but the Court of Appeals reversed, 697 F.2d 1291 (9th Cir. 1982), on the authority of *Weinberger v. Salfi*, 422 U.S. 749 (1975) and *Mathews v. Eldridge*, 424 U.S. 319 (1976). The Secretary now asks this Court to revise significantly the guiding jurisdictional principles set out in *Salfi* and *Eldridge* and to overrule *Mathews v. Diaz*, 426 U.S. 67 (1976). The decision of the Court of Appeals was correct and should be affirmed.

II. Factual Background.

Bilateral carotid body resection ("BCBR") is a surgical procedure developed in the early 1960's for relief of the symptoms of severe chronic obstructive pulmonary disease ("COPD") (*e.g.*, chronic bronchitis, emphysema, asthma).[2]

[2] The carotid bodies are structures the size of a rice grain located on each side of the neck which are involved in a reflex system which controls the diameter of the bronchical tubes. Under normal conditions, when the carotid body senses a significantly reduced blood oxygen level, nerve impulses are generated, triggering a reflex system which rapidly increases ventilation, reducing the level of carbon dioxide in the blood. Thereafter, ventilation is reduced and the respiratory system is returned to a normal, steady rate. In people who have COPD, the reflex system is hyperreactive and triggers at a

(footnote continues)

Beginning in the mid 1970's the Secretary refused to pay medicare benefits for BCBR unless ordered to do so by an ALJ, on the ground that BCBR is never "reasonable and necessary" treatment for pulmonary disease. The Secretary contends that BCBR is not accepted generally by the medical community and that "controlled clinical studies establishing the safety and effectiveness of this procedure are needed." Brief for the Petitioner at 7. The Secretary's position is based upon an alleged lack of data and *not* upon data suggesting that BCBR is unsafe or ineffective.

Despite the Secretary's prohibition on payment for BCBR, many medicare beneficiaries have undergone the surgery, initially at their own expense and usually as a last resort for relief from otherwise intractable pulmonary symptoms. The Secretary uniformly denies claims for reimbursement, and medicare beneficiaries regularly challenge the denial in administrative hearings. In *every one* of the 170 claims decided prior to the filing of this lawsuit, an ALJ found BCBR to be reasonable and necessary medical treatment, and the medicare program was ordered to reimburse the claimant for the cost of the surgery. The 170 claims were decided in approximately twenty-five separate cases by at least ten different ALJs.

Following rejection of the "nonpayment" policy in the first 70 appeals, the Secretary appealed the decisions as a group to the HHS Appeals Council, a panel of administrative law judges which is the highest administrative hearing body with jurisdic-

---

(footnote continued)

much lower threshold than it does in normal individuals, producing a severe bronchospasm, sometimes evident clinically as an asthmatic attack, chronic bronchitis (coughing), or emphysema (*i.e.*, shortness of breath). Considerable evidence developed through use of the Winter technique of BCBR seems to indicate that removal of the carotid bodies immediately changes (*i.e.*, elevates) the threshold at which the reflex system triggers, relieving the bronchospasm of COPD patients and opening the bronchial passages. After BCBR, the patient will experience fewer or no reflex responses unless there is an overwhelming stimulus. BCBR surgery does not cure COPD. However, the change effected by BCBR may be sufficient to preclude further symptoms for the remainder of the patient's life, thereby allowing the patient to lead a more independent and normal life. Further, because the debilitating symptoms of COPD largely are eliminated by BCBR, patients require fewer doctor visits and the need for repeated hospitalization—all reimbursed by medicare—is likewise often eliminated. *See generally In re Ferguson*, No. 126-12-3830 (HHS Appeals Council, October 18, 1979).

tion to review the cases.[3] The Appeals Council limited its review to the medical evidence relied upon by the Secretary to support her "nonpayment" policy, and declined to hear testimony from individual patients because, based on the records below, it assumed that all claimants would testify favorably. *See In re Ferguson,* No. 126-12-3830 at 3 (HHS Appeals Council, Oct. 18, 1979). After three days of hearings devoted exclusively to expert medical testimony, the Appeals Council held that the available medical evidence did not justify the Secretary's policy of nonpayment for BCBR, ruled that BCBR was reasonable, necessary and effective medical treatment for pulmonary distress in the cases at issue, and ordered the medicare program to pay in those cases. *Id.* at 23-24.

The Appeals Council's decision is a reasoned and thorough rejection of the Secretary's "nonpayment" policy. The Appeals Council's decision rests on four premises. First, the Appeals Council reviewed a 1978 Report of a National Institutes of Health Task Force on BCBR which the Secretary claimed supported her policy and concluded that, rather than supporting the Secretary's ban on payment, the NIH Task Force report "did not recommend that the operation cease to be performed," but instead suggested that *more* detailed studies should be conducted of patients *"currently undergoing"* BCBR. *Id.* at 18 (emphasis in quoted portion appears in the text). Second, the Appeals Council also found that BCBR had support within "some segments of the medical community" *id.* at 19, and that, while BCBR apparently is not prescribed or supported by most doctors, more than twenty-five physicians, all of whom had clinical experience with BCBR patients, had testified orally or in writing before the Appeals Council, reporting "very good" to "spectacular" and "astounding" results. *Id.* at 14-16, 19. Third, the Appeals Council found that "overwhelming" evidence "establishes that the enhanced quality of life . . . [of BCBR patients] has been demonstrated." *Id.* at 19.

---

[3] Technically, only one case was before the Appeals Council, but the parties stipulated that the decision would govern all 70 cases decided by ALJs to that point. Consolidation was possible because the single issue in each ALJ hearing was the validity of the Secretary's policy forbidding payment. *In re Ferguson,* No. 126-12-3830 at 3 (HHS Appeals Council, October 18, 1979).

In view of the demonstrated efficacy of BCBR, the Appeals Council stated that the "issue . . . is whether the long-range death rates of [BCBR] patients are so high as to be unacceptable" when compared to alternative methods of treatment. *Id.* After comparing mortality figures for 384 BCBR patients against similar figures for patients treated conventionally, the Appeals Council concluded that even though BCBR "patients were older and presumably were [more] seriously ill" than the patients in the baseline studies, "[t]he record . . . does not show a greater mortality rate for [BCBR] patients than for those under medical management." *Id.* at 22.

The Appeals Council stated that its conclusion was not definitive or precedential because "[f]uture studies and data may compel a different conclusion," a position which is both prudent and consistent with the position plaintiffs have taken throughout this litigation. *Id.* at 23. Despite requests by the NIH Task Force on BCBR, the Appeals Council and numerous physicians and physiologists for clinical trials of BCBR, the Secretary has made no effort to conduct scientific studies or obtain new data on BCBR. Instead, the Secretary freely admits that her present "nonpayment" policy is predicated upon exactly the same evidence that the Appeals Council found insufficient to preclude payment in 1979. Brief for the Petitioner at 6-7, 9. The Appeals Council subsequently has followed *Ferguson* and awarded benefits for BCBR, without a hearing. *In re Kohnen*, No. 335-07-2535 (HHS Appeals Council, Dec. 4, 1979).

Plaintiffs' initial complaint, filed in September, 1980, sought declaratory and injunctive relief precluding the Secretary from adhering to illegal claims review procedures which required every BCBR claimant to pursue essentially duplicative and meaningless hearings as a prerequisite to eligibility for benefits.[4] Plaintiffs did *not* seek a determination that any claimant was eligible for medicare benefits and did not request that the court order payment of benefits.[5] The relief sought by plaintiffs, if granted, will affect the procedures utilized to review benefit claims for BCBR *before* any claimant's eligibility for benefits is determined. Not one cent of medicare benefits will be paid as a direct or consequential result of a District Court ruling in plaintiffs' favor. In fact, recognizing that the District Court would not award benefits, plaintiffs have pursued their benefit claims through the administrative procedures established by the Secretary even while challenging the nonpayment policy.

In October, 1980, one month after suit was filed in this case, the Secretary published a Health Care Financing Administration ("HCFA") Ruling prohibiting medicare payment for BCBR in any circumstances. 45 *Fed. Reg.* 71426 (Oct. 28, 1980). The Ruling merely formalized the policy banning payment for BCBR which the Appeals Council had rejected one year before in the *Ferguson* case. The Ruling *precluding*

---

[4] Named plaintiffs in the initial Complaint, which was styled a class action, were Freeman H. Ringer, Sanford Holmes, Norman R. Webster-Zieber, Dorothy Briggs, Ernie Haley, Jean Vescio and Benjamin Winter, M.D. Since the filing of that Complaint plaintiffs Briggs, Haley and Vescio have died. All plaintiffs except Benjamin Winter suffer from severe chronic obstructive lung disease and either have had or wish to have BCBR. Plaintiff Winter is the physician of the patient plaintiffs and, in addition, serves (pursuant to 20 C.F.R. §404.1700 *et seq.* (1980)), without compensation, as the representative for numerous BCBR claimants in administrative hearings. Although the Secretary filed a "Notice of Non-Opposition" to Plaintiffs' Motion for Class Certification, *see* J.A. at 2, item 15, the District Court never ruled on that Motion.

[5] The Court of Appeals nonetheless held that respondents' secondary claims were claims for benefits under the Medicare Act but that plaintiffs' "central...procedural claims may be considered apart from these claims." *Ringer v. Schweiker*, 697 F.2d 1291, 1294 (9th Cir. 1982).

payment for BCBR was based almost entirely on the 1978 NIH Task Force Report that the Appeals Council relied upon as support for *compelling* payment. *Id.* Since the promulgation of the BCBR Ruling, one ALJ has refused to order payment for BCBR.[6] Plaintiffs' Amended Complaint added counts challenging the procedures by which the Secretary promulgated the Ruling.

The Secretary has stated over and over again that "[b]y reason of the Secretary's ruling published in the *Federal Register*, the administrative law judges and the appeals council are required to follow the Secretary's ruling precluding coverage for BCBR" (Secretary's Brief in the Court of Appeals at 28 n.11), and that, due to the Ruling, "no beneficiaries will be reimbursed for BCBR." *Id.* at *20. *See also,* 45 *Fed. Reg.* 71426, 71427 (Oct. 28, 1980). In the District Court the Secretary stipulated that:

> The Department of Health and Human Services has ruled that "Bilateral carotid body resection performed to relieve and treat pulmonary symptoms and diseases is not established as safe and effective and, therefore, is excluded from Medicare coverage under the authority of Section 1862(a)(1) of the Act."

---

[6] Plaintiffs submitted a copy of the decision in this case to the Ninth Circuit Court of Appeals. The decision involved over 100 claimants, and surgeries performed both before and after the BCBR Ruling. Reimbursement was denied in all cases, but reimbursement was denied in 59 cases where the surgery occured after publication of the Ruling solely on the basis of the Ruling. *See* Petition for a Writ of Certiorari at 20 n.15.

This single adverse decision illustrates one of the practical inequities of the Secretary's position. Where, as here, the agency loses all but a single case before the ALJs, and judicial review of the single adverse decision is sought, the Secretary likely will be afforded the substantial advantage of arguing on appeal that the single decision favorable to the agency must be accorded deference and affirmed under the substantial evidence test despite the fact that prior to publication of the Ruling, the ALJs, on full consideration of the merits, regularly rejected the Secretary's position in some 170 cases.

Joint Appendix at 32. In this Court, the Secretary continues to assert that the Ruling binds both ALJs and the Appeals Council to deny all claims for BCBR:

> In response to these developments on October 28, 1980, HCFA issued a formal administrative ruling—binding upon ALJs and the Appeals Council—that prohibited payments under Medicare for BCBR performed after that date. 45 *Fed. Reg.* 71426-71427 (1980); see 20 C.F.R. § 422.408.

Brief for the Petitioner at 9. *See* also Petition for a Writ of Certiorari at 6. All claims presented to an ALJ for BCBR performed after October 1, 1980 have been denied based solely upon the Ruling.[7]

Despite her admission that BCBR patients cannot obtain benefits through the administrative process, the Secretary insists that all administrative remedies must be exhausted completely as a jurisdictional prerequisite to judicial review. The significance of the Secretary's demand for further administrative litigation should not be lost in the technical legal arguments.

---

[7] At least 50 cases in which BCBR reimbursement claims were dismissed without hearing by ALJs solely on the basis of the Ruling were appealed to the Appeals Council. On May 3, 1982 the Appeals Council reversed the dismissals of a group of 10 of these cases and remanded the cases to ALJs for hearings on the ground that 42 C.F.R. §405.720 guarantees claimants the right to a hearing. The Appeals Council did not address either the merits of the dismissals or the validity of the Ruling. No hearings ever were held, however, and in August of 1982 the Appeals Council proposed to take jurisdiction over and consolidate every pending administrative case presenting any issue relating to BCBR. Plaintiffs' counsel and the Appeals Council staff calculated that there were at least 170 such cases pending at various stages of the administrative process at that time (in addition to the 170 cases which had completed the administrative process). Based on past claims experience, there are probably well over 200 administrative BCBR cases pending today solely as the result of the relitigation policy challenged in this case.

All BCBR claimants are, by definition, severely ill with incurable respiratory diseases.[8] Since this action was filed three years ago, three of the original six named plaintiffs have died. One of the plaintiffs, Ernie M. Haley, was unable to pay for BCBR and then seek reimbursement, and died while awaiting BCBR. Plaintiff Ringer likewise is unable to afford the operation and has been forced to endure his debilitating pulmonary symptoms during the course of this litigation. *See* J.A. at 32. Plaintiff Jean Vescio could not afford BCBR, which had been prescribed by her physician at the time the case was filed. However, after filing of the original complaint, Ms. Vescio's physician determined that her physical condition was deteriorating so rapidly that BCBR could not be delayed despite the Secretary's payment prohibition. Hospital and surgical services were arranged for Ms. Vescio on an emergency basis without any assurance of payment and, on October 11, 1980, Ms. Vescio underwent BCBR and thereafter filed a claim for payment.[9] The impact of the Secretary's policy is most acute for those medicare beneficiaries, who, unlike Ms. Vescio, are unable to obtain emergency care without charge and are therefore left to suffer or perhaps, to die. Similarly, the Secretary does not explain how claimants who are unable to pay for the surgery, file a claim for reimbursement and then litigate the claim administratively, ever could challenge the Secretary's policy.[10]

---

[8] Note that the Appeals Council calculated death rates over a term of only three years. Forty-four percent of the patients who did not receive BCBR were dead within three years while slightly more than thirty percent of BCBR patients died within three years of surgery. *In re Ferguson*, No. 126-12-383 at 20-22 (HHS Appeals Council, Oct. 18, 1978). The Council also noted that the mean age for the 384 BCBR patients which it studied was 66 years. This case bears out the suggestion implicit in the data.

[9] Counsel understands that Ms. Vescio survived until December 26, 1982.

[10] Plaintiff Ringer, for example, never had the surgery and thus did not file a formal claim for payment of medicare benefits, but he did informally request (by letter) that reimbursement be made available for his surgery. Mr. Ringer was advised that no information could be provided unless he underwent treatment and filed a claim for reimbursement. Ms. Vescio also sought to determine coverage prior to obtaining BCBR. Ms. Vescio was advised that BCBR was excluded from coverage and would not be covered (Filed as Exhibits in Court of Appeals, December 28, 1981. *See* J.A. at 5). Under *Mathews v. Eldridge*, 424 U.S. 319, 329 (1976) the filing of such a request constitutes the filing of a claim under 42 U.S.C. §405. The Court of Appeals apparently believed that it was unnecessary to address these issues. 697 F.2d at 1296 n.4. The Court of Appeals did not hold, as the Secretary claims, that there was no jurisdiction over Mr. Ringer's claims.

SUMMARY OF ARGUMENT.

The Court of Appeals correctly held that complete exhaustion of administrative remedies is not a jurisdictional prerequisite to judicial review where, as here, "the Secretary's ruling makes the results of the [administrative] process both pre-ordained and immutable" so that "appeals [are] futile . . . [and] worthless to the Agency as well as the claimant." 697 F.2d 1295-96. Thus, as in *Mathews v. Diaz*, 426 U.S. 67 (1976), the Secretary's admission that the Ruling absolutely prohibits even ALJs and the Appeals Council from awarding benefits for BCBR is "tantamount to a decision denying the application and a waiver of the exhaustion requirements." 426 U.S. at 73, 76-77. Moreover, because plaintiffs challenge the Secretary's right to relitigate the validity of the BCBR policy—and not the substantive merits of the policy or of a benefit determination—further administrative exhaustion will inflict the very injury plaintiffs seek to avoid even if, as occurred prior to promulgation of the Ruling, every claimant ultimately is awarded benefits by an ALJ, or by a District Court. *Mathews v. Eldridge*, 424 U.S. 319, 328, 330 (1976).

The Secretary's contention that Congress has committed to her unfettered and unreviewable discretion the determination of when an administrative decision is "final" for purposes of judicial review ignores the holdings of this Court in *Weinberger v. Salfi*, 422 U.S. 749 (1975), *Mathews v. Eldridge*, 424 U.S. 319 (1976) and *Mathews v. Diaz*, 426 U.S. 67 (1976). In *Salfi*, *Eldridge* and *Diaz* this Court determined, *over the objection of the Secretary*, that exhaustion of administrative remedies would be futile and that complete exhaustion was not a prerequisite to judicial review. The Secretary thus invites the Court to overrule *Mathews v. Diaz* and significantly to restrict *Salfi* and *Eldrige*.

Because jurisdiction is available under 42 U.S.C. § 405(g) there is no need to determine whether jurisdiction is also available under the mandamus statute, 28 U.S.C. §1361. *Califano v. Yamasaki*, 442 U.S. 682, 698 (1979). Nonetheless, the Court of Appeals ruling that mandamus jurisdiction is available for plaintiffs' procedural claims is both correct and consistent with numerous other Circuit Court cases addressing the question. As those cases indicate, Congress gave no indication when it enacted the judicial review provisions of the Social Security Act that it intended to limit the availability of mandamus review of administrative action. The enactment of 28 U.S.C. §1361 in 1962 merely extended mandamus jurisdiction to every federal district court, and Congress has never restricted the reach of the statute in Social Security Act cases. Because plaintiffs contend that the Secretary subjects claimants to unlawful administrative review processes in violation of specific obligations imposed by law the complaint states a claim within the District Court's mandamus jurisdiction.

Finally, because 42 U.S.C. § 405(g) confers jurisdiction to hear this case whether plaintiffs' claims are characterized as "procedural" or as claims for benefits, it is unnecessary to consider other potential bases for jurisdiction. However, the Court of Appeals correctly held, in the alternative, that plaintiffs' principal claims are in fact purely "procedural" and that this is not an action "to recover on any claim" arising under the Medicare Act. 42 U.S.C. § 405(h). Consequently, federal question jurisdiction, 28 U.S.C. §1331, over respondents' complaint is neither dependent upon nor intercepted by 42 U.S.C. § 405 as interpreted and applied in *Salfi* and *Eldridge*.

ARGUMENT.

I. The Decision of the Court of Appeals Finding Jurisdiction Under 42 U.S.C. § 405(g) Is Dictated By *Weinberger v. Salfi* and Its Progeny.

In *Mathews v. Eldridge*, 424 U.S. 319 (1976), this Court explained that Section 405(g) establishes two prerequisites—one waivable, one nonwaivable—to the exercise of jurisdiction over a claim for Medicare benefits. 424 U.S. at 328. The nonwaivable component of Section 405(g) jurisdiction is the requirement that a claim for benefits be presented to the Secretary. *Id.* at 330. The second requirement, that administrative remedies be exhausted completely, may be waived by either the Secretary or, even over the Secretary's objection, by the court. *Id. See also, Mathews v. Diaz*, 426 U.S. 67, 72-73, 76-77 (1976); *Heckler v. Lopez*, No. A-145 (Slip Op. filed Oct. 11, 1983) (Stevens, J. dissenting). In *Weinberger v. Salfi*, 422 U.S. 749 (1975), for example, the named plaintiffs had not obtained an ALJ or an Appeals Council decision, and the Secretary objected in the District Court to any waiver of the exhaustion requirement. This Court, however, determined that complete exhaustion was unnecessary, held that jurisdiction was available under 42 U.S.C. § 405(g), and ruled on the merits of the claims of the named plaintiffs. *Weinberger v. Salfi*, 422 U.S. 749, 753, 765 (1975). *See also, id.* at 801-802 (Brennan, J., dissenting).

In this case the Secretary admits that at least some of the named plaintiffs have satisfied the non-waivable requirement of 42 U.S.C. § 405(g) by filing the required claim for benefits. Brief for the Petitioner at 38. The Secretary, however, argues that complete exhaustion cannot be waived because she has determined by regulation that "full internal exhaustion" is necessary before a decision denying benefits is administratively "final" for purposes of judicial review. Brief for the Petitioner at 38-42.

Paradoxically, the Secretary also argues that the BCBR Ruling is "binding upon ALJs and the Appeals Council" and henceforth will prohibit any medicare payment for BCBR even if claimants do exhaust all of her "full internal" procedures.[11] Brief for the Petitioner at 9. *See also,* Petition for a Writ of Certiorari at 6. The Secretary's statement before this Court merely confirms identical assertions and stipulations made in the District Court and in the Court of Appeals. *See supra* at pp. 7-8. The Ruling itself states: "The purpose of this ruling, therefore, is to make our coverage decision binding on ALJs and the Appeals Council." 45 *Fed. Reg.* 71426, 71427 (Oct. 28, 1980). Thus, as the Court of Appeals noted, all BCBR claims for treatment rendered after issuance of the BCBR Ruling have been denied based solely on the Ruling. *Ringer v. Schweiker,* 697 F.2d 1291, 1293 (9th Cir. 1982).

The Secretary's repeated assertion that the ALJs and the Appeals Council are bound by the BCBR Ruling and that BCBR claims cannot be allowed under any circumstances, brings this case within the doctrine of *Mathews v. Diaz,* 426 U.S. 67 (1976) and obviates any need for further exhaustion of

[11] The Secretary's explanation of the benefits of exhaustion of her "full internal" procedures, Petitioner's Brief at 44-46, is seriously misleading. Plaintiffs do not pretend to argue that the doctrine of exhaustion of administrative remedies does not advance valuable governmental purposes. However, this case does not involve administrative claims which could "be granted or denied for reasons unrelated to the [BCBR Ruling]," or claims which could be " 'invalid for other reasons' . . . quite aside from a challenged rule." Petitioner's Brief at 45. Cases where "the individual was not covered by Medicare," or BCBR "was not reasonable or necessary for other reasons [not covered by the Ruling]," *id.,* obviously would not turn on the Ruling, so exhaustion of administrative challenges to the Ruling would never be at issue in such cases. Further, a judgment in plaintiffs' favor on the issues raised in this case would not affect in any way the Secretary's ability to dispose of BCBR cases in due course on grounds unrelated to the Ruling. For example, a judgment in plaintiffs' favor in this case would not preclude the Secretary from rejecting a claim for BCBR reimbursement by someone who was not a medicare beneficiary or who failed to file a timely claim for benefits, or by a patient who had undergone BCBR as treatment for a hangnail. Those cases, however, are not before the Court here.

administrative remedies. In *Diaz*, this Court noted that Section 405(g) jurisdiction was available to hear and decide the benefit claims of a plaintiff who had not exhausted the administrative process prescribed by regulation because "in colloquy with the [District] court [the Secretary] acknowledged that [plaintiff] had filed an application which could not be allowed under the statute." *Id.* at 73 (footnote omitted). This Court also held that jurisdiction was available to decide the claim of a second plaintiff because the Secretary had stipulated in the District Court—and reaffirmed in briefs before this Court—that his application would not be allowed. This Court ruled: "For jurisdictional purposes, we treat the stipulation in the District Court as tantamount to a decision denying the application and as a waiver of the exhaustion requirements." *Id.* at 76-77.[12]

In this case, there is much more than a concession in colloquy between counsel and the District Court. Indeed, the Secretary has admitted over and over again the accuracy of the Court of Appeals conclusion that "the Secretary's ruling makes the results of that [administrative hearing] process both pre-ordained and immutable," 697 F.2d at 1295, and, therefore, both "futile" and "worthless to the Agency as well as the

[12] While the Secretary attempts to distinguish *Salfi*, *Eldridge* and *Diaz* by arguing that the regulations which define when a decision is "final" and subject to judicial review were supplemented in 1980, the administrative process at issue has been in effect since at least 1972 *see, e.g.*, 37 *Fed. Reg.* 5814 (Mar. 22, 1972) (right to hearing) and consequently, the definition of a "final decision" was settled even before *Salfi* was decided. Further, the expedited appeal regulations upon which the Secretary also relies heavily were issued before *Diaz* was decided and were specifically called to this Court's attention. Brief for Petitioner at 41. *See also* 40 *Fed. Reg.* 53385 (Nov. 18, 1975). Thus, this Court implicitly has rejected the very position the Secretary advocates here.

claimant." *Id.* at 1296. As in *Diaz*, the Secretary's repeated concessions that all BCBR claims will be denied is tantamount to a final decision and a waiver of further administrative exhaustion.[13]

In *Salfi*, *Eldridge* and *Diaz*, this Court asserted jurisdiction over plaintiffs' substantive claims even though there had not been a single ALJ or Appeals Council decision on the issues. In contrast, in this case there have been more than 170 claims decided by at least ten different ALJs. In addition, the substantive issues have been thoroughly litigated before the Appeals Council. Thus, as the Court of Appeals noted, 697 F.2d at 1294, n.1, an extensive administrative record comprising virtually all available data on BCBR already has been compiled at great effort and expense. The Secretary's statements and the record before the Court demonstrate that "further exhaustion would not merely be futile for the applicant, but would also be a commitment of administrative resources unsupported by any administrative or judicial interest." *Ringer v. Schweiker*, 697 F.2d 1291, 1295 (9th Cir. 1982), *quoting Weinberger v. Salfi*, 422 U.S. 749, 765-66 (1975).

---

[13] The conclusion of this Court, expressed in *Salfi*, *Eldridge* and *Diaz*, and of the Court of Appeals below that administrative action is "final" for purposes of judicial review when it is effective and cannot be corrected by further administrative review is consistent with Congress' understanding of the term when it enacted the judicial review provision of the Administrative Procedure Act, 5 U.S.C. §704. The Senate Judiciary Committee Report states: " 'Final' action includes any effective agency action for which there is no other adequate remedy in any court." S. Rep. No. 752, 79th Cong., 1st Sess., *reprinted in*, Administrative Procedure Act: Legislative History 1944-46 at 213 (1946). In language particularly applicable here, the Report continues:

> In no case may appeal to "superior agency authority" be required by rule unless the administrative decision is inoperative, because otherwise the effect of such a requirement would be to subject the party to agency action and to repetitious administrative process without recourse. *There is a fundamental inconsistency in requiring a person to continue "exhausting" administrative processes after administration action has become, and while it remains, effective.*

Id. (emphasis added).

The Court of Appeals conclusion that the BCBR Ruling "makes clear that the Secretary will treat as final any denial of benefits for the BCBR operation," 697 F.2d at 1295, also is consistent with the rulings of other Courts of Appeals. The Second Circuit has found that even informal republication of a policy statement during litigation challenging that policy was sufficient to confer subject matter jurisdiction:

> We note also that the Secretary has had ample opportunity since the decision below to modify his position to conform to the Appeals Council rulings. Instead, during the pendency of this appeal, he has distributed new forms [reaffirming the policy rejected by the Appeals Council]. We agree with the Third Circuit that a "final position" by the Secretary may, in some circumstances, amount to a "final decision". [Citations omitted]. We find that under the circumstances here there is subject-matter jurisdiction in the District Court.

Jones v. Califano, 576 F.2d 12, 19 (2nd Cir. 1978). *See also Kuehner v. Schweiker*, No. 82-1514 at 8-11 (3rd Cir. Slip. Op. filed Sept. 19, 1983); *Liberty Alliance of the Blind v. Califano*, 568 F.2d 333, 346 (3rd Cir. 1977); *De Lao v. Califano*, 560 F.2d 1384, 1388 (9th Cir. 1977).[14]

[14] The cases cited by the Secretary as standing for the proposition that exhaustion is still required even if the administrative process might not resolve the claims in the claimant's favor are inapposite. Brief for Petitioners at 43 n.30. The cases cited by the Secretary noted that relief might still have been available through the administrative process. Here, the Secretary insists that the payment ban is absolute. In addition, the cases involve claims for hospital reimbursement under a different administrative review scheme. Finally, the Secretary's cases do not involve claims by individual claimants that the benefit review procedures are illegal.

Furthermore, in *Mathews v. Eldridge*, 424 U.S. 319 (1975) this Court cautioned that "the core principal that statutorily created finality requirements should, if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered remains applicable." *Id.* at 331 n.11. Plaintiffs' principal claim is that the Secretary's adherence to benefit review procedures requiring duplicative litigation violates 42 U.S.C. § 405(h) and denies due process of law. Thus, plaintiffs' principal claims rest on the proposition that it is exhaustion of the administrative remedy which causes the unlawful injury. *Mathews v. Eldridge*, 424 U.S. 319, 331 (1976); *Continental Can Co. v. Marshall*, 603 F.2d 590, 597 (7th Cir. 1979). As a result, if plaintiffs are forced to litigate their claims through the administrative process prior to seeking a judicial determination that the relitigation policy is unlawful, the injury will be complete and irremediable.

The Court of Appeals ruling that exhaustion "would fail to vindicate all the interests pressed by claimants even if the claimant won the appeal," 697 F.2d at 1296, is consistent not only with *Eldridge* but with numerous decisions of this Court and of the lower courts holding that exhaustion of administrative remedies is not required where "the plaintiff contends that the administrative system itself is unlawful or unconstitutional in form or application." *Patsy v. Florida International University*, 634 F.2d 900, 904 (5th Cir. 1981), *reversed on other grounds*, ____ *U.S.* ____, 102 S. Ct. 2557 (1982). *See also Barry v. Barchi*, 443 U.S. 55, 63 n.10 (1979) *quoting Gibson v. Berryhill*, 411 U.S. 564 (1973); *Continental Can Co. v. Marshall*, 603 F.2d 590, 597 (7th Cir. 1979); *Caswell v. Califano*, 583 F.2d 9, 13-15 (1st Cir. 1978); *Blankenship v. Secretary of HEW*, 587 F.2d 329, 332 (6th Cir. 1978).

Finally, plaintiffs' interest in prompt judicial review is predicated upon a vital interest in restoring their ability to function as viable human beings and often upon life or death concerns. The Secretary wholly ignores the fact that the BCBR Ruling—and the necessity of litigating to obtain benefits—often delays or precludes beneficiaries from obtaining medical

treatment for serious pulmonary disease. In another case where it was claimed that similar delay was of no consequence, this Court said:

> To allow a serious illness to go untreated until it requires emergency hospitalization is to subject the sufferer to the danger of a substantial and irrevocable deterioration in his health. Cancer, heart disease, or respiratory illness, if untreated for a year, may become all but irreversible paths to pain, disability, and even loss of life. The denial of medical care is all the more cruel in this context, falling as it does on indigents who are often without the means to obtain alternative treatment. [Footnote omitted].

Memorial Hospital v. Maricopa County, 415 U.S. 250, 261 (1974).

This case sadly demonstrates the realities anticipated in *Memorial Hospital*. Three of the six original named plaintiffs in this case have died since the complaint was first filed. The condition of one plaintiff who had not had BCBR at the time the case was initiated deteriorated while the action was pending to the point that BCBR had to be performed on an emergency basis. The Secretary stipulated in the District Court that another plaintiff would testify that BCBR has been prescribed to relieve "severe breathing difficulties" suffered as a symptom of "severe lung disease," but that he was unable to obtain BCBR because of inability to pay the cost of the treatment. J.A. at 32. Because of their physical condition, their age and their dependency upon the health insurance coverage provided by medicare, plaintiffs have raised at least a colorable claim that erroneous denial (and delay) in the payment of benefits will damage them "in a way not recompensable through retroactive payments." *Mathews v. Eldridge*, 424 U.S. 319, 331 (1976).

The Secretary has pointed to no interest in further exhaustion sufficiently compelling to overcome plaintiffs' interest in their life and health.[15]

Jurisdiction over this case is available under 42 U.S.C. § 405(g). The ruling of the Court of Appeals is consistent with *Weinberger v. Salfi*, 422 U.S. 749 (1975) and with *Mathews v. Eldridge*, 424 U.S. 319 (1976), and is dictated by this Court's holding in *Mathews v. Diaz*, 426 U.S. 67 (1976).

II. The Court Of Appeals Properly Held That Plaintiffs' Claims Fall Within The District Court's Mandamus Jurisdiction.

A. Mandamus Jurisdiction Under 28 U.S.C. § 1361 Is Not Precluded By 42 U.S.C. 405(h).

The Court of Appeals also held that plaintiffs' procedural claims may be considered under the mandamus statute, 42 U.S.C. § 1361. As in *Califano v. Yamasaki*, 442 U.S. 682, 698 (1979), it is unnecessary to determine the availability of mandamus jurisdiction because jurisdiction is available under 42 U.S.C. § 405(g).

---

[15] This Court elsewhere has rejected the Secretary's suggestion that further proceedings should be required because they might lead to reconsideration of the Ruling:

> It is unrealistic to expect that the Secretary would consider substantial changes in the current administrative review system at the behest of a single aid recipient raising a constitutional challenge in an adjudicatory context.

Mathews v. Eldridge, 424 U.S. 319, 330 (1976). Furthermore, the history of this case counsels against giving credence to the Secretary's claim. If adverse decisions from ten separate ALJs sitting in twenty-five consolidated cases, and the Appeals Council, do not cause the Secretary to revise her Ruling, the suggestion that an additional administrative appeal would prompt such action is incredible. In fact, the Ruling issued in response to this litigation absolutely requires ALJs and the Appeals Council to deny BCBR coverage based upon the very same 1978 government report relied upon by the Appeals Council, among other things, to rule that the medicare program must pay the costs of BCBR. *In re Ferguson*, No. 126-12-3830 at 18 (HHS Appeals Council, October 18, 1978).

However, consistent with the decision below, the Courts of Appeals have held that jurisdiction to review procedures employed by the Secretary of Health and Human Services exists under Section 1361 where the Secretary "owes the plaintiff a clear duty to act." *Ellis v. Blum*, 643 F.2d 68, 81 (2nd Cir. 1981) (Friendly, J.). *See also, Kuehner v. Schweiker*, 82-1514 (3rd Cir. Slip Op. filed Sept. 19, 1983); *Leschniok v. Heckler*, 713 F.2d 520, 522 (9th Cir. 1983); *Powderly v. Schweiker*, 704 F.2d 1093, 1095 (9th Cir. 1983); *American Ass'n of Councils of Medical Staffs of Private Hospitals, Inc. v. Califano*, 575 F.2d 1367, 1373 (5th Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979); *Matos v. Secretary of H.E.W.*, 581 F.2d 282, 287 n.8 (1st Cir. 1978); *Barnett v. Califano*, 580 F.2d 28, 31 (2nd Cir. 1978); *Association of American Medical Colleges v. Califano*, 569 F.2d 101, 113 (D.C. Cir. 1977); *Elliott v. Weinberger*, 564 F.2d. 1219, 1227 (9th Cir. 1977); *Ryan v. Shea*, 525 F.2d 268, 271 (10th Cir. 1975); *Mattern v. Weinberger*, 519 F.2d 150, 156 (3rd Cir. 1975), *vacated on other grounds*, 425 U.S. 987 (1976); *Frost v. Weinberger*, 515 F.2d 57, 61-62 (2nd Cir. 1975), *cert. denied*, 424 U.S. 958 (1976); *Martinez v. Richardson*, 472 F.2d 1121, 1125-26 (10th Cir. 1973).[16]

Section 405 as originally enacted precluded the exercise of jurisdiction only under specific, clearly identified statutory provisions. *See* Respondents' Appendix at 2a.
Because the statutory grant of mandamus jurisdiction, 28 U.S.C. § 1361, did not exist at the time the Social Security Act's jurisdictional limitations were enacted, the authors of Section 405 could not have intended to proscribe jurisdiction under that provision. *Ellis v. Blum*, 643 F.2d 68, 81 (2nd Cir. 1981); *Elliott v. Weinberger*, 564 F.2d 1219, 1227 (9th Cir. 1977); *Aldrich v. Schweiker*, 555 F. Supp. 1080, 1085 n.4 (D. Vt. 1982).

---

[16] Care should be taken to distinguish cases, including some arising in the social security context, where a *writ* of mandamus was denied because the party seeking the writ had failed to allege the traditional prerequisite to mandamus jurisdiction, *i.e.*, the existence of a judicially enforceable duty. *Compare, e.g., Hadley Memorial Hospital, Inc. V. Schweiker*, 689 F.2d 905, 912 (10th Cir. 1982); *Americana Healthcare Corp. v. Schweiker*, 688 F.2d 1072, 1083-87 (7th Cir. 1982); *Cervoni v. Secretary of Health Education & Welfare*, 581 F.2d 1010, 1019-20 (1st Cir. 1978) *with Roberts v. United States ex rel. Valentine*, 176 U.S. 221, 231 (1900) and the cases cited in the text.

However, at the time Section 405 was enacted, the United States District Court for the District of Columbia *did* possess mandamus jurisdiction over federal officials, a jurisdiction derived from Maryland common law and codified as early as 1801. The District of Columbia mandamus jurisdiction had been held to be an appropriate basis for challenges to administrative action long before Section 405 was enacted. *See, e.g., Stark v. Wickard,* 321 U.S. 288, 290 (1944); *Roberts v. United States,* 176 U.S. 221, 229-231 (1900); *West Coast Exploration Co. v. McKay,* 213 F.2d 582, 592 (D.C. Cir. 1954) (*en banc*), *cert. denied,* 347 U.S. 989 (1954); *United States ex rel. United States Borax Co. v. Ickes,* 98 F.2d 271 (D.C. Cir. 1938) and cases cited therein. The 1962 mandamus statute merely removed technical barriers to the exercise by all district courts of the historic equity jurisdiction traditionally exercised by the District of Columbia courts. Section 1361 did not create or confer previously unknown power on the federal courts. *See, e.g., Ellis v. Blum,* 643 F.2d 68, 80-81 (2nd Cir. 1981); *Peoples v. Dept. of Agriculture,* 427 F.2d 561, 564-65 (D.C. Cir. 1970).

The Second Circuit, relying on the historical background and the plain language of Section 405(h), accordingly has held:

> When Congress enacted § 405(h) in 1939, it did not bar the District of Columbia courts from issuing writs of mandamus against the Secretary's predecessor, and that when the power to issue such writs was decentralized in 1962, it did not then suddenly become subject to § 405(h)'s stricture.

Ellis v. Blum, 643 F.2d 68, 81 (2nd Cir. 1981). *See also, Kuehner v. Schweiker,* No. 82-1514 at 11 (3rd Cir. Slip Op. filed Sept. 19, 1983) (opinion for the court) and 27 (Becker, J., concurring); *Starnes v. Schweiker,* No. 82-1543 at 18-21 (4th Cir. Slip Op. filed Aug. 16, 1983); *Elliott v. Weinberger,* 564 F.2d 1219, 1227 n.12 (9th Cir. 1977). Furthermore, "[t]his conclusion is fortified by the knowledge that when Congress desired to prohibit actions in the nature of mandamus to review

decisions involving the dispensation of another type of federal disability benefit, it did so expressly." *Ellis v. Blum*, 643 F.2d 68, 81 n.14 (2nd Cir. 1981).[17]

---

[17] The Secretary's suggestion that the Court infer that Section 405 precludes mandamus jurisdiction is directly contrary to the settled rule that a statute will not be read to preclude jurisdiction unless the intent to do so is specifically set forth or evident from clear and convincing evidence. There is simply no evidence anywhere of Congressional intent to subsume within section 405's proscriptions all further additions to Title 28's grants of jurisdiction. *Elliott v. Weinberger*, 564 F.2d 1219, 1227 n.12 (9th Cir. 1977). Indeed, one court has suggested that "[s]ince general mandamus jurisdiction did not even exist when Congress first enacted §405(h), the codifiers would have unjustifiably expanded the reach of §405(h) if they had added a clause barring actions under 28 U.S.C. §1361 to recover on a disability claim. *Aldrich v. Schweiker*, 555 F. Supp. 1080, 1085 n.4 (D. Vt. 1982).

Moreover, as Judge Friendly pointed out in *Ellis v. Blum*, 643 F.2d 68, 80 (2nd Cir. 1981), the legislative history of other pertinent statutory provisions confirms the view that section 405 does not limit the availability of mandamus jurisdiction at all. First, the legislative history of the 1976 amendment to 28 U.S.C. §1331, the federal question statute, expressly recognizes that "nonstatutory review of Federal administrative actions" under the mandamus statute and the common law jurisdiction of the District of Columbia courts supplements other available avenues of review. *Id., quoting* H. Rep. No. 94-1656, 94th Cong., 2d Sess. 15-16 (1976) U.S. Code Cong. & Adm. News 6121, 6136. Moreover, Congress in enacting the Administrative Procedure Act also expressly recognized the availability of mandamus relief as an alternative or supplement to statutory review provisions. In discussing the judicial review provisions of the APA, for example, the Attorney General noted that the section was intended to declare existing law concerning judicial review and stated:

> This subsection requires that where a specific statutory method is provided for reviewing a given type of case in the courts, that procedure shall be used. If there is no such procedure, or if the procedure is inadequate (i.e., where under existing law a court would regard the special statutory procedure as inadequate and would grant another form of relief), then any applicable procedure, such as prohibitory or mandatory injunction, declaratory judgment, or habeas corpus, is available.

Appendix to Attorney General's Statement Regarding Revised Committee Print of October 5, 1945, *reprinted* as Appendix B to S. Rep. No. 752, 29th Cong., Ist Sess. (1945), *reprinted in* Senate Committee on the Judiciary, Administrative Procedure Act: Legislative History, 79th Cong. 1944-46 230 (1946). In another portion of the Report the Committee explained that

(footnote continues)

B. Plaintiffs Have Alleged A Non-Discretionary Duty Sufficient To State A Cause Of Action Within The District Court's Mandamus Jurisdiction.

This case is appropriate for the exercise of mandamus jurisdiction because plaintiffs alleged that the Secretary violated specific statutory and constitutional duties. For example, plaintiffs alleged that the Secretary has an obligation under Section 405(h)—the very same section the Secretary asserts precludes jurisdiction here—to conform her benefit review procedures to the decisions of the Administrative Law Judges and the Appeals Council. The first sentence of that provision states:

> The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing.

42 U.S.C. § 405(h).[18] It has been held that "the obvious purpose of [Section 405(h)] is to declare that res judicata principles are applicable to the findings and decisions of the

---

(footnote continued)

nonstatutory review through prohibitory or mandatory injunction or declaratory judgment, for example, "may be operative before statutory forms of review are available; and in a proper case it may be utilized to determine the validity or application of agency action." S. Rep. No. 752, 79th Cong. 1st Sess. (1945), *reprinted in*, Senate Commitee on the Judiciary, Administrative Procedure Act: Legislative History 79th Cong. 1944-46 212 (1946). Thus, the evidence suggests that Congress historically has recognized the availability of non-statutory and common law forms of review—including "mandatory injunctions"—despite provisions for statutory review where such statutorily prescribed forms of review were either unavailable or insufficient.

[18] The Secretary's argument that because the Appeals Council stated that the *Ferguson* decision is not precedential, the decision also must be denied res judicata effect is wrong. The Secretary ignores the plain language of Section 405(h). The Secretary also confuses precedential *value* with collateral estoppel *effect*. Courts generally recognize that even if a decision or ruling has no precedential value it nonetheless may preclude relitigation of the issues previously decided. The rules of many of the Courts of Appeals explicitly recognize the difference between precedential value and collateral estoppel effect. In pertinent part Ninth Circuit Rule 21(c) states:

> A disposition which is not for publication shall not be regarded as precedent and shall not be cited to or by this court or any district court of the Ninth Circuit, either in briefs, oral argument, opinions, memoranda, or orders, *except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel.*

(footnote continues)

SSA made in certain procedural contexts." *Stuckey v. Weinberger*, 488 F.2d 904, 909 (9th Cir. 1973) (footnote omitted). *Cf. Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, Inc.*, 402 U.S. 313, 339-342 (1971). The Secretary plainly has no discretion to ignore the statutory mandate.[19]

In addition, the complaint alleges that the Secretary has a constitutional duty under the due process clause to conform her claims review process to the decisions of the Administrative Law Judges and the Appeals Council. The Courts of Appeals have held that federal agencies are bound by precisely the constitutional duty alleged by plaintiffs. *Ellis v. Blum*, 643 F.2d 68, 81 (2nd Cir. 1981) ("[I]t would strain belief to think that Congress meant to require a plaintiff to forego mandamus and resort to prolonged § 405 procedures where a clear duty in the defendant to pay disability benefits, *e.g.*, a prior judgment, had been demonstrated."); *Jones v. Califano*, 576 F.2d 12, 18 (2nd Cir. 1978) ("[T]he Secretary's refusal to follow the rulings of

---

(footnote continued)

Rule 21(c), Ninth Circuit Rules (emphasis added).

See also Rule 8(f), District of Columbia Circuit Rules (unpublished orders are "not to be cited . . . as precedents" but may be referred to "for such purposes as application of the doctrines of res judicata, collateral estoppel and law of the case, which turn on the binding effect of the judgment, and not on its quality as precedent."); Rule 18(d)(ii), Fourth Circuit Rules; Rule 25.4, Fifth Circuit Rules; Rule 25(b) Sixth Circuit Rules; Rule 8(i), Eighth Circuit Rules.

[19] The Secretary misstates the nature of this case and the relief plaintiffs seek by arguing that only questions involving her "judgment and discretion and the weighing of available data and other evidence" are at issue here. Brief for Petitioner at 36. The Secretary argues, for example, that mandamus jurisdiction is an inappropriate basis for a challenge to her discretionary decision not "to make payment for BCBR." *Id.* Plaintiffs do not challenge in this case the validity of the Secretary's conclusions regarding the medical evidence on BCBR—the Appeals Council already has rejected the Secretary's conclusions—nor do they seek the payment of benefits. The nondiscretionary duty alleged by plaintiffs is the Secretary's duty to conform her claims review procedures to the requirements of law. It would be unreasonable for the Secretary to suggest that the second and third sentences of Section 405(h) are mandatory and judicially enforceable, but that the res judicata principles contained in the first sentence of the same section are merely advisory and not subject to judicial enforcement.

his own Appeals Council raises colorable questions of equal protection and due process."); *Continental Can Co. v. Marshall*, 603 F.2d 590 (7th Cir. 1979).[20]

The duties alleged by respondents have been recognized and enforced by the courts in virtually identical circumstances and plainly are sufficient to bring this action within the District Court's mandamus jurisdiction.[21]

---

[20] The Secretary's argument that no duty arises inasmuch as the BCBR policy was rejected in cases involving claimants other than plaintiffs is refuted by the holdings of this Court abrogating the doctrine of mutuality of estoppel. *Montana v. United States*, 440 U.S. 147 (1979); *Parklane Hosiery Co v. Shore*, 439 U.S. 322 (1979). *See also, Starker v. United States*, 602 F.2d 1341 (9th Cir. 1979). The Secretary was a party to the cases before the ALJs and she actively litigated the cases before the Appeals Council. In these circumstances plaintiffs' allegations are sufficient to state a colorable claim that the Secretary is obliged to adhere to the decisions of the ALJs and the Appeals Council. Plaintiffs do not contend that the Secretary is bound forever by the Appeals Council and ALJ decisions. If the Secretary obtains evidence refuting the holding of the Appeals Council and the ALJs, the Secretary would be free to reopen the issue under traditional principles. *See, e.g., Continental Can Co. v. Marshall*, 603 F.2d 590, 595 n.7 (7th Cir. 1978).

[21] Petitioner's alternative argument—that the second sentence of Section 405(h) bars mandamus jurisdiction even if the third does not—is wholly without merit. Insofar as this case is concerned the sentence states that no findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or government agency except as herein provided. The Court of Appeals decision plainly does not authorize mandamus to review findings of fact or a decision by the Secretary denying benefits. Instead, the ruling expressly limits the availability of mandamus to procedural questions. *Ringer v. Schweiker*, 697 F.2d 1291, 1293-94 (9th Cir. 1982.). *See also, Ellis v. Blum*, 643 F.2d 68, 81 (2nd Cir. 1981) (Mandamus jurisdiction poses no threat to the system of review provided in Sections 405(g) and (h) because "factual disputes are not amenable to the mandamus remedy").

III. The Court Of Appeals Ruling That Plaintiffs' Claims May Be Heard Under 28 U.S.C. § 1331 Is Consistent With Prior Decisions Of This Court.

Because 42 U.S.C. § 405 establishes a jurisdictional base irrespective of whether plaintiffs' claims are characterized as claims for benefits or as procedural claims, it is unnecessary to consider the Secretary's argument that the Court of Appeals mischaracterized such claims as procedural and erroneously asserted federal question jurisdiction, 28 U.S.C. § 1331. *See, e.g., Califano v. Yamasaki*, 442 U.S. 682, 698 (1978). However, the differences between the present case and *Salfi* and *Eldridge* demonstrate that the Court of Appeals characterization of plaintiffs' principal claims as procedural in nature was correct and that federal question jurisdiction was properly asserted.

The significance of characterizing plaintiffs' lawsuit as an action to recover Medicare "benefits" derives solely from the language of 42 U.S.C. § 405(h). Section 405 restricts federal question jurisdiction only insofar as the plaintiff seeks "to recover on any claim" arising under the Medicare Act. 42 U.S.C. § 405(h). Thus, if the action is not one "to obtain payments pursuant to the Medicare Act," *St. Louis University v. Blue Cross Hospital Service*, 537 F.2d 283, 289, 291-92 (8th Cir.), *cert. denied*, 429 U.S. 977 (1976), and the "plaintiff here is not merely seeking relief which is substantially equivalent to an award of money damages," *Griffin v. Richardson*, 346 F. Supp. 1226, 1230 (D. Md.), *aff'd*, 409 U.S. 1069 (1972), the action is not one brought to recover on a claim and therefore is not subject to the restrictions imposed by Section 405(h). *See also, Attorney Registration and Disciplinary Comm'n v. Schweiker*, No. 83-1132 at 6 (7th Cir. Slip Op. filed August 11, 1983); *Leschniok v. Heckler*, 713 F.2d 520, 522 (9th Cir. 1983); *Humana of South Carolina, Inc. v. Califano*, 590 F.2d 1070, 1080 (D.C. Cir. 1978), *Elliott v. Weinberger*, 564 F.2d 1219,

1227 n.11 (9th Cir. 1977). *Cf. Wright v. Califano*, 587 F.2d 345, 349-50 (7th Cir. 1978), *White v. Mathews*, 559 F.2d 852, 856 (2nd Cir. 1977), *cert. denied*, 435 U.S. 908 (1978).[22]

As the Court of Appeals recognized, the "major thrust" of the complaint is "first and foremost, to invalidate the Secretary's procedure." 697 F.2d at 1294. Indeed, in the Court of Appeals the Secretary expressly acknowledged that plaintiffs "do not pray for the payment of money." Appellant's Brief at 14. Plaintiffs' eligibility for Medicare benefits will be determined only in subsequent administrative or judicial proceedings, and a favorable ruling by the District Court will not dictate the result in those proceedings.

In *Mathews v. Eldridge*, this Court described a claim which Section 405(h) did not bar as "collateral" to benefit claims which would be precluded. 424 U.S. at 330. As one court recently has noted, the *Eldridge* approach to collaterality "is a pragmatic one," *Kuehner v. Schweiker*, No. 82-1514 at 18 (3rd Cir. Slip Op. filed Sept. 19, 1983) (Becker, J., concurring), and such claims are readily identifiable. First, a claim is collateral where, as here, it involves "the right to have correct procedures followed *before* the request [for benefits is considered]," *Heckler v. Lopez*, No. A-145 at 5 (Slip Op. filed Oct. 11, 1983) (Stevens, J., dissenting) (emphasis in original). *See also*

[22] Comparison of the nature of the relief sought by plaintiffs with the relief sought in *Weinberger v. Salfi*, 422 U.S. 749 (1975) and *Mathews v. Eldridge*, 424 U.S. 319 (1976) demonstrates the fallacy of the Secretary's contention that the Court of Appeals ruling is inconsistent with the decisions of this Court. In both *Salfi* and *Eldridge* the plaintiffs sought and received relief from the lower courts which included the immediate right to payment of benefits under the Social Security Act—benefits which they otherwise never would have received. 422 U.S. at 755; 424 U.S. at 325 n.3. Indeed, this Court's decision in *Salfi* emphasized that the jurisdictional restrictions of 42 U.S.C. § 405(h) applied because "it is Social Security benefits which appellees seek to recover." 422 U.S. at 760. *See also id.* at 755, 761. In *Eldridge*, while plaintiff challenged the Secretary's procedures, he also claimed an immediate right to payment of benefits under the Social Security Act. 424 U.S. at 325.

Mathews v. Eldridge, 424 U.S. 319, 330 (1976); *Ellis v. Blum*, 643 F.2d 68, 77, 82 n.15 (2nd Cir. 1981). Second, the claim is collateral where, as here, should plaintiffs prevail, the Secretary nevertheless would be at liberty to deny reimbursement in appropriate cases, so long as lawful procedures were employed. *See, e.g., Kuehner v. Schweiker*, No. 82-1514 at 21 (3rd Cir. Slip Op. filed Sept. 19, 1983) (Becker, J., concurring). Plaintiffs' "procedural" claims are "collateral" to any claim for benefits and therefore are not precluded by Section 405(h).

The complaint also alleges that the Secretary's relitigation policy and her failure to conform her claims review process to the decisions of her ALJs and of the Appeals Council deprive plaintiffs of due process of law. *See Ringer v. Schweiker*, 697 F.2d 1291, 1293 (9th Cir. 1982). Such a constitutional claim clearly is substantial and is not subject to any administrative exhaustion requirement created by the Secretary. *See, e.g., Jones v. Califano*, 576 F.2d 12, 18 (2nd Cir. 1978); *Continental Can Co. v. Marshall*, 603 F.2d 590, 596-97 (7th Cir. 1979). *See also, Kuehner v. Schweiker*, No. 82-1514 at 8 (3rd Cir. Slip Op. filed Sept. 19, 1983), *citing Liberty Alliance of the Blind v. Califano*, 568 F.2d 333, 345-46 (3rd Cir. 1977). The Secretary appears to concede that the District Court retains federal question jurisdiction to decide colorable constitutional claims not necessarily affecting entitlement to benefits. Brief for the Petitioner at 28 n.18. *See also Schweiker v. McClure*, 456 U.S. 188 (1982); *St. Louis University v. Blue Cross Hospital Service*, 537 F.2d 283, 291-93 (8th Cir. 1976); *Ellis v.Blum*, 643 F.2d 68, 77 (2nd Cir. 1981).

Plaintiffs also challenge the failure of the Secretary to promulgate the BCBR Ruling in accordance with the procedural requirements of the Administrative Procedure Act. It is settled that Section 1331 jurisdiction is available over such a claim "to vindicate an interest in procedural regularity." *Humana of South Carolina, Inc. v. Califano*, 590 F.2d 1070, 1080 (D.C. Cir. 1978). *See also, National Assn. of Home Health Agencies v. Schweiker*, 690 F.2d 932, 937 (D.C. Cir. 1982), *cert. denied*, ____ U.S. ____, 103 S.Ct. 1193 (1983); *Daniel Freeman Memorial Hospital v. Schweiker*, 656 F.2d 473, 476

(9th Cir. 1981).[23] Again, these claims were sufficient to accord the District Court jurisdiction over the complaint.

Because granting the relief sought by plaintiffs in this case will not result in the payment of benefits, this action is not one "to recover on any claim" under the Medicare Act and not subject to the restrictions of 42 U.S.C. § 405(h).

IV. The Secretary's Claim That The Court Of Appeals Decision Will Disrupt The Administration Of The Medicare Program Is Erroneous.

Throughout her brief the Secretary argues that complete preclusion of judicial review even of her procedures is necessary to avoid substantial disruption in the administration of the medicare program. Rather than demonstrating why this Court should foreclose judicial review, the Secretary's protestations—considered in light of recent developments—actually demonstrate why judicial review must be available in cases such as the present one.

At the time the Petition for Writ of Certiorari was filed, this case appeared to be a virtually unique instance in which an administrative agency refused to adhere to the consistent rulings of its own ALJs. Since that time, however, it has become clear that the substantive and jurisdictional issues raised in this case are far from unique. This case, rather than representing an isolated instance of bureaucratic schizophrenia, now seems to involve merely one application of the Secretary's policy of ignoring administrative and judicial decisions with which she disagrees.

---

[23] The Secretary's argument that her policy to follow the notice and comment procedures of the Administrative Procedure Act in matters relating to Social Security benefits, announced in the *Federal Register*, 36 *Fed. Reg.* 2532 (1971) "is internal only and not judicially enforceable," Petitioner's Brief at 32 n.23, is frivolous and has been rejected by the courts. *Rodway v. Department of Agriculture*, 514 F.2d 809, 814 (D.C. Cir. 1975); *Lewis v. Weinberger*, 415 F. Supp. 652, 661 (D.N.M. 1976); *Florida v. Weinberger*, 401 F. Supp. 760, 761 (D.D.C. 1975). *See also, Morton v. Ruiz*, 415 U.S. 199, 235 (1974); *Service v. Dulles*, 354 U.S. 363, 386-88 (1957); *United States ex rel Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954).

Several recent cases highlight the Secretary's challenge to the authority of the courts and ALJs. In *Jones v. Califano*, 576 F.2d 12 (2nd Cir. 1978) plaintiffs challenged the Secretary's continued adherence to a benefit determination policy which the ALJs and the Appeals Council had rejected on four occasions. Here, of course, the Secretary ignores 170 adverse decisions rendered in twenty-six consolidated cases by ten different ALJs (not including the Appeals Council). In *Leschniok v. Heckler*, 713 F.2d 520 (9th Cir. 1983) the Secretary refused to recognize a plainly stated provision of the Social Security Act and ordered her ALJs to "ignore this express statutory command." *Id.* at 523. In *Kuehner v. Schweiker*, No. 82-1514 (3rd Cir. Slip Op. filed Sept. 19, 1983), the Secretary instructed her ALJs to follow a policy of "nonacquiescence" in certain judicial rulings which struck down her policy regarding termination of Social Security disability benefits. *Id.* at 9-10. In two recent Vermont cases it was alleged that, as here, claimants were forced "to pursue lengthy administrative appeals because the Secretary persists in promulgating standards for eligibility that are contrary to the law of the circuit." *Aldrich v. Schweiker*, 555 F. Supp. 1080, 1082-84, 1088 (D. Vt. 1982); *Spear v. Harris*, No. 80143 at 7 (D. Vt. Slip. Op. filed July 31, 1980). Most recently, in *Lopez v. Heckler*, the District Court for the Central District of California granted a preliminary injunction against the Secretary's announced policy of "nonacquisence" in not one, but two decisions of the Ninth Circuit. *See Lopez v. Heckler*, No. 83-697-WPG(T) (C.D. Cal. Slip Op. filed June 18, 1983), *stay granted, Heckler v. Lopez*, 52 U.S.L.W. 3187 (Sept. 20, 1983) (Rehnquist, Circuit Justice), *refusing to vacate stay*, No. A-145 (Order entered October 11, 1983).

The Secretary has been charged by Congress with the responsibility of administering programs designed to provide needed medical assistance to the elderly, the poor and the disabled, for whom Social Security benefits are often a matter of life and death. The effect of the Secretary's policy of "nonacquiesence" falls most heavily on persons least able to bear the deprivation of Social Security assistance, and least able to challenge the Secretary's illegal action. As a result, one must

wonder whether other unreported instances exist in which the Secretary has elected to ignore the repeated rulings of the judiciary or the ALJs. It bears repeating that in this case alone the Secretary's stubborn adherence to her relitigation policy has precluded two of the six named plaintiffs from obtaining medicial treatment prescribed for symptomatic relief of their severe pulmonary diseases notwithstanding the Appeals Council's *Ferguson* decision and over 170 ALJ rulings rejecting that very policy.

In this case, and in others like it, it seems certain that elderly, ill and disabled citizens who Congress intended to benefit from Social Security Act programs actually have suffered financially as well as physically, because the Secretary deprived them of statutory rights to which the courts and the ALJs consistently rule they are entitled. *See, e.g., Heckler v. Lopez*, No. A-145 at 4 (Slip Op. filed Oct. 11, 1983) (Brennan, J., dissenting); *Leschniok v. Schweiker*, 713 F.2d 520, 522-23 (9th Cir. 1983). The ultimate issue in this case is not the Secretary's position on BCBR. The real issue before the Court is the integrity of the administrative review process and the authority of the courts to interpret and enforce the law. Congress simply could not have intended to preclude judicial review where the effect of such preclusion is to insulate the Secretary's deliberate violations of law from scrutiny and correction.

CONCLUSION.

The Secretary's insistence that elderly and disabled Medicare beneficiaries must litigate repeatedly issues which she has lost in nearly 200 cases is both unlawful and fundamentally unjust. The Court of Appeals holding will permit the District Court to correct the injustice. The Judgment of the Court below should be affirmed.

Respectfully submitted,

MALCOLM J. HARKINS, III
CASSON, CALLIGARO & MUTRYN
9808 Wilshire Boulevard
Suite 304
Beverly Hills, CA 90212
(213) 858-5981

JOSEPH E. CASSON
ROBERT FABRIKANT
JOSEPH L. BIANCULLI
CASSON, CALLIGARO & MUTRYN
900 Watergate Office Building
2600 Virginia Avenue, N.W.
Washington, D.C. 20037
(202) 462-3200

Attorneys for Plaintiffs

October, 1983

APPENDIX A

STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. §1331 *as amended* by Pub. L. 94-574, §2, 90 Stat. 2721 (1976); Pub. L. 96-486, §2(a), 94 Stat. 2369 (1980) provides:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

2. 28 U.S.C. § 1361 provides:

The district courts shall have original jursidiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

3. Sections 205(g) and (h) of the Social Security Act, as codified at 42 U.S.C. §§ 405(g) and (h), provide in relevant part:

(g) Judicial review

Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or with such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifiying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive.

* * *

(h) Finality of Secretary's decision

The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under sections 1331 or 1346 of title 28 to recover on any claim arising under this subchapter.*

* The provision set forth above reflects Section 405(h) as presently codified. Prior to the 1948 Revision of the Judicial Code the final sentence of § 405(h) read: "No action against the United States, the Board, or any officer or employee thereof shall be brought under section 24 of the Judicial Code of the United States to recover on any claim arising under this title." Social Security Act Amendments of 1939, Pub. L. No. 76-379, §205(h), 53 Stat. 1360, 1371 (1939). Section 24 of the Judicial Code was repealed by Act of June 25, 1948, Pub. L. No. 80-773, §39, 62 Stat. 869, 992 (1948).